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No.

In the
SUPREME COURT OF THE UNITED STATES

October Term, 2001

Baltia Air Lines, Inc.
(shareholders, employees and creditors), Petitioner
v.
Canadian Imperial Bank of Commerce, and
CIBC Oppenheimer Corp, Respondents

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Second Circuit

PETITION FOR A WRIT OF CERTIORARI

Of Counsel:
STEVEN ORLIKOFF
220 E. 54th Street, #7N
New York, NY 10022
(212) 826-6747

STEFFANIE J. LEWIS
Counsel of Record

THE INTERNATIONAL
BUSINESS LAW FIRM, PC
3511 North 13th Street
Arlington, Virginia 22201
(703) 522-1198
Fax: (703) 522-1197
slewis@iblf.com

Attorneys for Petitioners

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QUESTIONS PRESENTED

Section 17A(b)(6) of the Securities Exchange Act provides that "[n]o registered clearing agency shall prohibit or limit access by any person to services offered by any participant therein." 15 USC§78q-1. A broker/dealer who contracts to use a clearing agency to process trades is a participant therein. A clearing agency may limit a participant's access only if due process procedures of §17A(B)(5) are followed. The public has no direct contact with the clearing agency and has access to clearing services through a participant who is usually a licensed broker/dealer. Section 29(b) of the Act voids any contract or practice that violates any provision therein. 15 USC 78cc.

1. Does conduct directly violating §17A(b)(6) give rise to any private cause of action or create a legal relationship between a clearing agency and a person who was offered clearing service by a participant therein, whereby the clearing agency has a duty to disclose the risk that access to clearance might be denied him, at will?

2. When a clearing agency relies upon a contract right to selectively deny access in violation of §17A(b)(6), does the protected person have standing to use §29(b) in challenging the legality of that contract?

PARTIES TO THE PROCEEDINGS

Petitioner

Baltia Air Lines, Inc., a U.S. start up airline.

Respondent

Canadian Imperial Bank of Commerce, a foreign corporation doing business relevant to this case as CIBC Oppenheimer Corp., CIBC World Markets, CIBC Wood Gundy Securities, Inc., CIBC Aerogold Visa, CIBC AeroCorporate Visa, CIBC AeroMortgage, and Aeroplan Frequent Flyer Program.

Co-Respondent

CIBC Oppenheimer Corp is the U.S. Private Client Division of CIBC World Markets, the global marketing name of the investment banking and securities businesses of the Canadian Imperial Bank of Commerce (CIBC)[1]. CIBC Oppenheimer, formerly Oppenheimer & Co., Inc., does business as a licensed broker/dealer and also as a registered clearing agency. This suit names CIBC Oppenheimer Corp solely in its capacity as CIBC's registered clearing agency.

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[1]CIBC Oppenheimer Company Profile, Record, Ex. 17, p.7; A-262.

registered clearing agency.

STATEMENT PURSUANT TO RULE 29.6

Petitioner Baltia Air Lines, Inc. states that it has no corporate parents, and that no publicly held company owns 10% or more of the Baltia Air Lines's stock.

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PETITION FOR A WRIT OF CERTIORARI

Petitioner respectfully petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Second Circuit in this case.

OPINIONS BELOW

The appellate court's summary order affirming the district court's dismissal is unreported and is reproduced at 1a. The opinion and order of the district court is unreported and is reproduced at 6a. The New York Court of Appeals order denying leave to appeal is unpublished and is reproduced in at 8a. The New York Supreme Court, Appellate Division order denying leave to reargue and other relief is unpublished and is reproduced at 11a. The New York Supreme Court, Appellate Division, First Department Opinion affirming dismissal is published at 273 A.D. 2d 55; 709 N.Y.S. 2d 54 (2000) and is reproduced at 12a. The New York Supreme Court, First Division opinion and order is the transcript and unpublished.

JURISDICTION

The opinion of the United States Court of Appeals for the Second Circuit entered its opinion and order on April 25, 2001. Justice Ginsburg subsequently extended the time to file this petition for a writ of certiorari to and including October 29, 2001. Petitioners invoke this Court's jurisdiction under 28 U.S.C. §1254(1).

STATUTORY PROVISIONS INVOLVED

The Securities Exchange Act of 1934, as amended, 15 U.S.C. §§78a, *et seq.*

§3(23)(A) The term "clearing agency' means any person who acts as an intermediary in making payments or deliveries or both in connection with transactions in securities . . . .

(B) The term "clearing agency' does not include . . . (iii) any bank, broker, dealer. . . solely by reason of functions performed by such institutions . . . as customary banking, brokerage, dealing . . . activities, or solely by reason of acting on behalf of a clearing agency. . . .

§ 11A(a)(2) . . . The Commission, by rule, shall designate the securities or classes of securities qualified for trading in the national market system. . . .

§17A(a)(1) The Congress finds that . . . (D) The linking of all clearance and settlement facilities and the development of uniform standards and procedures for clearance and settlement will reduce unnecessary costs and increase the protection of investors and persons facilitating transactions by and acting on behalf of investors.

§17A(b)(5) In any proceeding by a registered clearing agency to determine whether a person shall be denied participation or prohibited or limited with respect to access to services offered by the clearing agency, the clearing agency shall notify such person of, and give him an opportunity to be heard upon the specific grounds for denial or prohibition or limitation under consideration and keep a record. A determination by the clearing agency to deny participation or prohibit or limit a person with respect to access to services offered by the clearing agency shall be supported by a statement setting forth the grounds on which the denial or prohibition or limitation is based.

§17A(b)(6) No registered clearing agency shall prohibit or limit access by any person to services offered by any participant therein.

§29(b) Every . . . contract . . . made the

> performance of which involves the violation of . . .any provision of this title . . . shall be void (1) as regards the rights of any person who, in violation of any such provision. . . shall have . . . engaged in the performance of any such contract. . . .

STATEMENT OF THE CASE

Respondent, a foreign entity, used its wholly-owned U.S. clearing agency to abort the sale of Petitioner's stock. Without cash from the sale to meet the regulatory working capital requirement, Petitioner could not commence flight operations destined were forecast to divert traffic from the airlines in which Respondent had significant financial interests. Petitioner is a U.S. start up airline that had exclusive U.S. rights to carry passengers, freight and mail nonstop direct between New York and St. Petersburg, Russia, the fourth largest city in Europe. All traffic between those two major cities was, and is, carried by foreign carriers or a combination of foreign and U.S. carriers that make one or more intermediate stops. Petitioner had been granted these rights following a year's proceedings before the U.S. Department of Transportation involving 12 competing U.S. airlines.

The U.S. government selected Petitioner's proposal because it was superior, furthered national aviation policy and was sustainable. To summarize relevant parts of the order: Petitioner proposed five weekly nonstop direct flights between New York and St. Petersburg. The choice of this new carrier increased competition in

international aviation and provided an opportunity for new investors willing to risk such an investment. Foreseeable market share of the traffic made Baltia's proposal sustainable. It was reasonable that Baltia, being the exclusive nonstop carrier, would divert significant traffic from foreign carriers serving between New York and St. Petersburg[2].

Commencement of operations was conditional upon having working capital equal to 1/4 annual expenses assuming zero revenue which Petitioner planned to raise through the sale of stock. Respondent, through its airline division, had knowledge of the route award and financial condition.

In June 1998 Petitioner sold, and a dealer purchased, stock on condition that it be registered and with payment due after the registration effective date at closing. The dealer was a participant in Respondent's clearing agency, offered Respondent's services for closing, and delivered Respondent's document which is the public disclosure of its confidential contract with the dealer and with all of its other participants. The document's language concealed the risk that Respondent might arbitrarily refuse access to clearance at will and without notice.

On February 1, 1999, and anticipating a February 5th closing, Respondent declared it would clear no transaction involving Baltia stock. By February 1, 1999, the dealer had placed the sale of all Petitioner's stock, a

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[2] U.S. Department of Transportation Order 91-6-2

registration effective date was set for February 5, 1999, stock was listed on The Nasdaq SmallCap Market, the Boston Stock Exchange, and Standard & Poor's. Thirteen states had approved the stock for sale. Petitioner had made down payments on two Boeing 747 aircraft, principal employees were in place, and all services contracts required by the FAA for initiating flights were signed.

Petitioner did not know what could prevent access to clearance. Respondent asserted it had no obligation to provide anything and refused written notice or rationale. During the window of time before closing had to occur, Petitioner tried unsuccessfully to identify the problem or find alternate financing. When time expired, Petitioner sued to compel access to clearance, and if denied, for damages for fraud.

Petitioner sued on the confidential contract for clearance that had been outlined Respondent's public disclosure statement and on Respondent's omitting from that document any indication that access might be denied, and at will. Respondent claimed the confidential contract gave it an absolute right to refuse services and it had no duty to disclose anything to Petitioner. Petitioner responded that Respondent had a duty specific to access and the contract was illegal. Further, the contract language reserving to Respondent a right to deny access was different in form from the rest of the document and had obviously been inserted. When read in context, the language only reserves to Respondent such rights as the Act permits. Respondent filed a letter from the New York Stock Exchange (NYSE) approving its participation

contracts as evidence of contract legality.

Thereafter, Petitioner subpoenaed several confidential participation contracts from the New York Stock Exchange ("NYSE") and spoke with its General Counsel denied that NYSE reviewed any participation contract for legality. Most of the subpoenaed-contracts contained language declaring a right to selectively refuse access to selected trades. During that time and responding to an inquiry about this case in an interview published internationally, Respondent's General Counsel advised all clearing agencies to "Make sure that the contract provides the clearing firm the right to refuse IPOs [Initial Public Offerings]."[3]

Petitioner consulted Mr. Melvin Weiss of Milburg, Weiss, Bernshard, Hynes and Lerach, and following his direction, reported Respondent's violation of §17A(b)(6) to the SEC.[4] Petitioner continued supplying the SEC with information as it was discovered. Petitioner was advised the following: SEC planned to take no action. No court had previously reviewed 17A(b)(6) and the SEC had specific jurisdiction[5] as well as limited resources. Even if it had the authority and brought an investigation, the SEC has no remedy for damages to the public

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[3]Record, Exhibit 29, p.2; A-287.

[4]Petitioner makes this proffer to be supported by correspondence at trial.

[5]Inferred was the SEC belief that it may not have jurisdiction to pursue an individual's right under 17A(b)(6).

person. Actions for damages are usually brought under §10(b) for fraud.[6]

Concurrently, Petitioner discovered that, excepting British Airways and Aeroflot, Respondent has financial interests in every airline that serves St. Petersburg, Russia with connections to New York through foreign countries. Each is required by treaty to make at lease one intermediate stop. The U.S. government had forewarned that those carriers would lose significant market share to Petitioner's nonstop direct service. Petitioner had anticipated strong competition but was unprepared for competition in the form of self-interested clearing agency interference with its underwriter.

The state court found that Respondent indeed had the contract right to deny Petitioner's access to capital, did not have a duty to disclose this contract right prior to its exercise, and dismissed Petitioner's suit.[7] Believing that the significant securities violations were now involved, Petitioner filed in federal courts which found no cognizable cause of action.

Without the requisite working capital from the sale of its stock, Petitioner was unable to commence flight operations, lost its U.S. government route authority for

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[6]15 USC 78j.

[7]The state appellate court denied Petitioner's petition to appeal. Petitioner, lacking funds, abandoned any challenge of the state appellate court's decision in the interest of pursuing the federal complaint.

dormancy, had no revenue with which to make payments on its aircraft, had to let employees go, and closed its office at JFK Airport.

Respondent continuously cleared all other trades the broker/dealer presented until he established participation in another clearing agency in December 1999.

The Securities Exchange Act of 1934

The Securities Exchange Act of 1934 was amended in 1975 to create a system of self-regulatory organizations. ("Act"). The self-regulatory organizations are Exchanges, Clearing Agencies and Securities Associations. Each is organized to comply with the Act. and to enforce compliance by its members with the rules of its organization. Section 17A of the Act was enacted in 1975 to establish the National System for Clearance and Settlement of Securities Transactions. The SEC was tasked with using its authority to assure equal regulation of clearing agencies therein. The SEC is to have due regard for the protection of investors in facilitating the establishment of the clearing system, its links and standards. The SEC is not tasked with enforcing the rights of the investor.[8]

Sections 17A(a) and (b) of the Act are relevant to

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[8]Congressional finding, Exchange Act §17A(a)(1); 15 USC 78q-1(a).

this case. In subsection 17A(a), Congress is concerned with the protection of investors and persons acting on their behalf who are principally broker/dealers. Congress finds that linked clearance facilities and uniform standards and procedures for clearance increase that protection.

Subsection 17A(b) links the clearance facilities and establishes standards. Clearance facilities,[9] linked by participation contracts, include clearing agencies and their users. Any person who uses a clearing agency to clear securities transactions is termed a "participant," but the term does not include a person whose only use of a clearing agency is through another person who is a participant.

The standards and procedures established in §17A(b) provide fair competition, due process and protection for the investor. Example: Clearing agencies are permitted to limit a participant's use of services but only for statutory reasons or for failure to comply with agency rules[10] and only by complying with the due process procedure of §17A(b)(5). By contrast, an

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[9]"Facility" is only defined in the Act with respect to exchanges. Congress refers to clearance facilities as distinguished from its reference to clearing agencies. One infers from the parallel structure of Exchanges and Clearing Agencies that the term "facility" with reference to Clearing Agencies would be parallel to that term with reference to Exchanges.

[10]See §17A(b)(4)(B). 15 USC 78q-1(b).

absolute prohibition to limit access is established in §17A(b)(6). No clearing agency shall prohibit or limit access by any person who was offered those services by a participant therein.

The Proceedings Below

The appellate court affirmed the district court's judgment that there was no cognizable cause of action against Respondents, either for violation of §17A(b)(6) or for concealment of its "contract right" to arbitrarily refuse clearing access and do so without notice. The court found that the Respondent's clearing agent exercised a valid contractual right in refusing to serve as the clearing agency for the public purchase of Petitioner's registered securities. The court held that Respondent had no duty to disclose, in its public disclosure of its clearing relationship with participants, the material securities risk that Respondent intended, at will, to arbitrary refuse access to clearance.

The court also held: 1) §17A(b)(6) does not provide a private right of action; 2) Predicate acts were not alleged to support a RICO claim; 3) Petitioner lacked standing to bring a §10(b) action; 4) Petitioner was collaterally estopped from asserting fraud and it's state law claims.

The court misapplied *Cort v. Ash*, 422 U.S. 66 (1975), did not consider Petitioner's illegality defense or apply §29(b) which voids any practice that violates the Act, and cited no language in the contract that would grant Respondents a right that would supersede

§17A(b)(6) in the federally preempted area of interstate securities transactions.

REASONS FOR GRANTING THE WRIT

I. A CASE OF FIRST IMPRESSION, THE APPELLATE COURT'S DECISION LEAVES UNCERTAINTY IN THE FIELD OF SECURITIES CLEARANCE, DENIES THE IMPORTANT PROTECTION OF A STATUTORY PROHIBITION AGAINST RESTRAINT OF TRADE BY CLEARING AGENCIES , CONFUSING THE INTENT AND MEANING OF STATUTE (§17A), AND PREVENTING AN INJURED PARTY ANY EFFECTIVE RECOURSE OR PROTECTION

No court has reviewed the rights devolving from subsection (6) to §17A(b) of the Act, although courts have reviewed other subsections. Section17A(b)(6) is distinctly different from the rest of §17A in that it is the only subsection that protects a person who is neither licensed by the SEC nor within the self-regulatory organizations that comprise the national securities exchange. By holding that Respondent's conduct that violates §17A(b)(6) of the Act gives rise to no cause of action, the appellate court denies an investor use the courts when damaged by a violation of that section. The investor is left with *post facto* remedies the SEC or self-regulating association may determine, none of which can restore a legitimate victim from grievous harm.

The decision below significantly hinders the administration of the Act. The SEC is not equipped to

handle individual violations of §17A(b)(6) and is not sure it has jurisdiction to do so. Even if it had the authority and chose to use its resources to pursue a violation of §17A(b)(6), the SEC has no remedy for the damaged public person and the New York Stock Exchange ("NYSE") does not review its members' participation contracts for legality.

The appellate court's decision weakened the mechanism for prompt clearance. To ensure prompt clearance Congress had provided a system for pre-qualifying users of the clearing agency, termed "participants,"[11] and gave the public access to clearance through them.[12] Congress also added the element of certainty upon which both the participants and their clients could depend.

In §17A(b)(5) Congress required that in any proceeding by a clearing agency to determine whether a person shall be limited with respect to access to services offered by the clearing agency, that clearing agency must gives notice and an opportunity to be heard on the specific grounds for limitation under consideration and keep a record. If a decision were reached to limit access, it must be supported by a statement setting forth the specific grounds on which the denial or prohibition or limitation is based.

In §17A(b)(6) Congress provided certainty to the

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[11] §17A(b)(1)through(5); 15 USC 78q-1(b)

[12] §17A(b)(6); 15 USC 78q-1(b)(6)

investor who relied upon the services of a broker/dealer who was linked with a clearing agency. The investor was assured that his transaction would have access to clearance[13] for consummation.

The decision below affirmed a clearing agency's practice of limiting a participants access on an ad hoc basis and without complying with §17A(b)(5). It affirmed a practice that voided the guaranteed access provided by §17A(b)(6). Respondent asserts that it has the right to even refuse access after previously having approved the trade. Affirming such a practice defeats the certainty created by Congress to facilitate prompt clearance.

The linking of clearance facilities and the development of standards within the national system for clearance were to protect the public investor.[14] Participation contracts are the means of linking. If upheld, the decision below converts linking into anti-competitive power and eliminates standards.

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[13]Congress assures "access" to clearance, not guaranteed clearance. The clearing agency is not compelled by §17A(b)(6) to contribute to fraud or be forced to clear where error exists or procedures were not followed. A comparable situation exists in the banking industry. A person has access to check clearance, but if there are insufficient funds, known fraud, or errors, the check will not clear.

[14]15 USC 78q-1(a)

II. A SHIFT OF POWER TO CLEARING AGENCIES WILL HAVE WIDE DETRIMENTAL IMPACT ON THE PUBLIC SECURITIES SYSTEM, PLACING THE POWER TO RESTRICT THE FLOW OF CAPITAL IN THE HANDS OF ORGANIZATIONS WHO MAY ACT AGAINST U.S. PUBLIC POLICY, WITHOUT EFFECTIVE REGULATION OF ANTI-COMPETITIVE CONDUCT, AND DENYING INVESTORS LEGITIMATE AND BENEFICIAL INVESTMENT OPPORTUNITIES.

The appellate court's decision shifted power from the investor to the clearing agency. Every person in this nation who buys or sells securities through a licensed broker/dealer is a potential victim of a clearing agency's abuse of that power. The SEC has no remedy nor does the NYSE and the broker/dealer provides none. Under the appellate court's decision, there is no remedy available in the courts. The public has no recourse and the power of clearing agencies appears to be increasing.

Securities trades transacted by mail or interstate commerce must be cleared through a registered clearing agency[15] and there are only a handful[16] in the nation.

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[15] §17A(b)(1)

[16] "Handful" is the quantity identified by Respondent's attorneys. Originally 12 clearing agencies were registered by the SEC. Today, the industry is dominated by the following 6 clearing agencies: Pershing, Bear Sterns, National Financial, U.S. Clearing, CIBC Oppenheimer and Merrill

Language, comparable to that sanctioned by the court, appears in the confidential contracts several clearing agencies have with their participants. Respondent advocates hat, to protect themselves against a suit for refusing access to a public person, all clearing agencies should include in their contracts with participants a right to arbitrarily refuse clearing services.[17] The industry press apparently reflects the expanding role of the clearing agency to "overseeing an offering." Currently and with little liability, clearing agencies assert language in confidential contracts to justify aborting, at will, any individual trades brought by a participating broker/dealer.

The participating broker/dealer has little power with which to protect its client. To remain in business, the broker/dealer is dependent upon maintaining an amiable relationship with its clearing agency. Respondent's boiler-plate participation agreement requires exclusivity and contains an arbitration clause. The participant agrees to give several months notice of termination while Respondent, who drafted and interprets its own contract, effectively terminates at will.

A broker/dealer cannot timely protect its client by presenting the transaction to an alternate clearing agency, by filing an arbitration claim against the clearing agency, or by joining the client in a suit. Section

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Lynch. Numerous small clearing agencies also exist but are insubstantial players in the market.

[17]Record, Exhibit 29, p.2.; A-287

17A(b)(3)(a) of the Act places the responsibility for enforcing participant compliance upon the clearing agency. Reasonably then, the clearing agency requires due diligence before contracting with a new participant. In the instant case, it took ten months for Petitioner's broker/dealer to establish participation in a subsequent clearing agency without interrupting business. Thereafter he dared file an NASD arbitration claim against Respondent, his former exclusive clearing agency. Today, more than a year after the claim was filed, there has not yet been a hearing. A broker/dealer cannot afford to join a client in a §17A(b)(6) suit for fear the clearance of his trades would be jeopardized. If the broker/dealer chose to participate in a different clearing agency, the other five dominant clearing agencies might find the suit cause to reject his application.

Petitioner's broker/dealer had no prior knowledge of Respondent's alleged contract right to arbitrarily refuse access to clearance, at will. Respondent's contract interpretation was based upon language that had been inserted in the confidential contract but omitted from the public disclosure of that contract. The disclosure statement assures the public of access to clearance. Further, the interpretation is inconsistent with the contract's opening paragraph declaring that Respondent will provide clearing service subject to terms and conditions of the securities laws. Finally, it is unreasonable to expect the broker/dealer to have anticipated that a clearing agency would directly violate a Federal statute.

A suit against the brokerage firm provides no legal

recourse. Such a suit would be neither ethically reasonable nor legally feasible. In the instant case, Petitioner believed it ethically reprehensible to sue the broker/dealer who had diligently worked for nine months, completed all aspects of the trade and lost a million dollars when Respondent refused access to anyone purchasing Petitioner's stock.[18] It was also a legal impossibility for Petitioner's broker/dealer to timely consummate the purchase.

The appellate court affirmed power shift that enables the clearing agency to arbitrarily control capital flow. Controlling or influencing the flow of capital can be used to implement or defeat federal policy. We see examples of implementing policy through tax incentives and in federal matching of state funds. The clearing agency's power to arbitrarily restrict capital can interfere with federal supremacy and policy.

Congress has unquestionably asserted federal preemption over interstate public securities transactions. Congress specifically provided that "[t]he Commission, by rule, shall designate the securities or classes of securities qualified for trading in the national market system[19]. Currently, clearing agencies can assert a contract right to unilaterally determine on an *ad hoc* basis

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[18]In the development of products liability cases, the law moved from requiring a suit against the innocent retail merchant to permitting suit directly against the negligent producer in appropriate cases.

[19]15 USC 78K-1(a)(2).

which of certain securities will, in fact, qualify to be traded. The federal government has dual interests in setting the standards for approving a security for sales to the public. The standard must be high enough to protect the public investor and not so high that it denies the public the benefits from, and an opportunity to invest in, an endeavor. When securities meet the standard, they qualify and are registered for public offering.

By granting judicial sanction to Respondent's conduct, the appellate court invaded the Commission's exclusive power to determine what securities qualify for trading. The decision gave the clearing agency the right to second guess the Commission and, in fact, arbitrarily make a self-determination on an *ad hoc* basis. The power to determine which stock will be traded can be abused for personal benefit at the expense of society's, as occurred in the instant case regarding international air service.

Interference with fulfillment of federal policy is a national concern and this case is an example of how the judicial sanction below granted a foreign bank power to trump a U.S. government decision and reverse policy. It is federal policy to utilize a scarce national resource to derive the greatest national benefit. The right to carry passengers and freight between the U.S. and a foreign country is a scarce national resource bargained for by the U.S. Department of State. The U.S. Department of Transportation ("DOT") expended resources for more than a year to select the airline proposal that would provide the greatest benefit to the U.S. traveling and shipping public.

The U.S. government selected Baltia's proposal because it was superior, furthered national aviation policy, and was sustainable. No other U.S. carrier proposed nonstop direct flights between New York and St. Petersburg.[20] The choice of a new carrier increased competition in international aviation. It provided a new opportunity for investors willing to assume the risk. Foreseeable market share of the traffic made Baltia's proposal sustainable.

The DOT held it reasonable that Baltia, being the exclusive nonstop carrier, would divert significant traffic from foreign carriers serving between New York and St. Petersburg.[21] By 1999, Respondent had financial interests in virtually every air carrier serving St. Petersburg with traffic from the New York market.[22]

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[20]It is known and accepted in route proceedings before the U.S. Department of Transportation that the first city on a multi-stop flight reaps the greatest economic benefit.

[21]U.S. Department of Transportation Order 91-6-2, p16 states: "Baltia would be the only carrier providing nonstop service from New York. It is, therefore, reasonable to anticipate that Baltia would divert a significant amount of traffic from the sixth freedom foreign carriers, as well as from Aeroflot and [then] Pan Am, which are currently providing only connecting one-stop or two-stop service.

[22] Excepting British Airways and Aeroflot, all are part of the Star Alliance developed with Respondent and in which Respondent has millions of dollars invested and loaned. "Marketing and code-sharing alliances and frequent-flier

Respondent, a foreign bank, used its wholly-owed U.S. clearing agency to stop Baltia from commencing operations and to prevent its diverting traffic that was then a revenue stream for Respondent.

As a result of the courts' decisions that Petitioner had no cause of action, the U.S. has lost value in its natural resource, *i.e.* the right to authorize nonstop direct flights into St. Petersburg. Today international aviation competition has not increased and U.S. passengers and shippers have no direct flights to St. Petersburg, Russia, the fourth largest city in Europe. More than 130 New York connecting flights arrive in St. Petersburg weekly through foreign cities that gain the greatest economic benefit. Had Petitioner been able to enforce §17A(b)(6), the economic gain from nonstop direct service could be benefitting the U.S..

As a result of the appellate court's affirmation of Respondent's arbitrary control over the flow of capital, the DOT policy of increasing options available to the traveling, shipping and investing public, as well as

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programs have been surrogates for classical mergers. I think this is the final consolidation phase of the airline industry. . . . Obviously the smaller carriers have objected to the fact that they've been abused by the larger companies. This will further strengthen their arguments." Respondent's Managing Director, CIBC World Markets and CIBC airline analyst. "But it doesn't mean lower fares. . . . To lower fares, you have to increase supply and alliance don't increase supply." Samuel Buttrick, airline analyst for Paine Webber. Record, Exhibit 36.

increasing competition in international aviation, were reversed.

The appellate court's decision weakened the national faith in, and reliance upon, the federal government's provisions for protection. The court failed to apply §29(b) and the U.S. Supreme Court decision in *Kaiser v. Mullins*, 455 U.S.72 (1982) which together void Respondent's contract and practice denying Petitioner access to clearance, the protection provided in §17A(b)(6).

Section 29(b) provides that every contract made in violation of any provision of the Act or the continuance of any relationship or practice in violation of any provision of the Act shall be void as against any person who made or engaged in the performance of the contract and *Kaiser* grants Petitioner standing to raise the defense.

The court in *Kaiser v. Mullins*, 455 U.S.72 (1982) stated:

> With respect to a statute which also provides that contracts which violate it are void, at the very least, Congress must have assumed that the statute could be raised defensively in private litigation to preclude the enforcement of a contract. Therefore, where a . . . defense is raised by a party which [the statutory section] was designed to protect and where the defense is not directed to a collateral matter but to the portion of the contract for which

> enforcement is sought, a court must entertain the defense.

Applying the holding in *Kaiser*, a court would be required to entertain Petitioner's defense. The appellate court did not do so, and enforced the contract against Petitioner.

CONCLUSION

For the foregoing reasons, the petition for writ of certiorari should be granted.

Respectfully submitted,

Of Counsel:
STEVEN ORLIKOFF
220 E. 54th Street,
#7N
New York, NY 10022
(212) 826 6747

STEFFANIE J. LEWIS
Counsel of Record
THE INTERNATIONAL
BUSINESS LAW FIRM, PC
3511 N. 13th Street
Arlington, Virginia 22201
(703) 522-1198
Fax: (703) 522-1197
slewis@iblf.com

APPENDIX

Baltia Air Lines, Inc., Plaintiff-Appellant-Cross-Appellee, v. CIBC Oppenheimer Corp., and Canadian Imperial Bank of Commerce, Defendants-Appellees-Cross-Appellants.

Nos. 00-7867, 00-7883 (XAP)

UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

2001 U.S. App. LEXIS 7814; *Fed. Sec. L. Rep. (CCH) P91,421*

April 25, 2001, Decided

NOTICE:

RULES OF THE SECOND CIRCUIT COURT OF APPEALS MAY LIMIT CITATION TO UNPUBLISHED OPINIONS. PLEASE REFER TO THE RULES OF THE UNITED STATES COURT OF APPEALS FOR THIS CIRCUIT.

PRIOR HISTORY:
Appeal from the United States District Court for the Southern District of New York, (Alvin K. Hellerstein, Judge).

DISPOSITION:
AFFIRMED in part, and VACATED and REMANDED in part.

COUNSEL:
APPEARING FOR APPELLANT: Steffanie Lewis, The International Business Law Firm PC, Arlington, VA.

APPEARING FOR APPELLEES: Howard Godnick, Schulte Roth & Zabel, LLP, New York, New York.

JUDGES:
PRESENT: HONORABLE Joseph M. McLaughlin, HONORABLE Fred I. Parker, HONORABLE Chester J. Straub, Circuit Judges.

OPINION:

SUMMARY ORDER

Plaintiff-appellant, Baltia Air Lines ("Baltia"), appeals from an order of the United States District Court for the Southern District of New York (Hellerstein, J.), entered on June 14, 2000, granting defendants-appellees', CIBC Oppenheimer Corp. ("Oppenheimer") and Canadian Imperial Bank of Commerce ("CIBC") (collectively, "defendants"), motion to dismiss the Amended Complaint pursuant to Fed. R. Civ. P. 9(b), 12(b)(1), and 12(b)(6) as well as Section 21D(b)(3)(A) of the Private Securities Litigation Reform Act of 1995 on the merits and on the ground of collateral estoppel. Defendants-appellees cross-

appeal the summary order entered on June 16, 2000 denying them an award of sanctions against plaintiff and its counsel pursuant to Fed. R. Civ. P. 11(b) and Section 21D(c) of the Securities Exchange Act of 1934 ("the Act"). See *15 U.S.C. § 78u-4*(c).

Baltia contracted with Hornblower & Weeks ("H&W") to underwrite its IPO on a firm-commitment basis. Oppenheimer, the firm that provided clearing services to H&W pursuant to an exclusive clearing agreement, exercised its contractual right and refused to serve as the clearing agency for Baltia's IPO.

Baltia sought an injunction in state court, which was denied, and the state court's decision on the merits was affirmed by the Appellate Division of the Supreme Court of New York. Permission to appeal to the Court of Appeals was denied. Baltia brought this action in federal court.

The district court dismissed Baltia's claimed violation of § 10(b) of the Act and Rule 10b-5 thereunder for lack of standing. That holding is affirmed. See *Chemical Bank v. Arthur Andersen & Co., 726 F.2d 930, 943 (2d Cir. 1984).*

[*3] We also affirm the district court's additional grounds for dismissal: (1) Oppenheimer did not have a duty to disclose, see *In re Blech Sec. Litig., 928 F. Supp. 1279, 1296 (S.D.N.Y. 1996)* (citing *Basic Inc. v. Levinson, 485 U.S. 224, 239 n.17, 99 L. Ed. 2d 194, 108 S. Ct. 978 (1988));* and (2) Baltia was collaterally estopped from asserting fraud (and its state law claims). See *Transaero, Inc. v. La Fuerza Aerea Boliviana, 162 F.3d 724, 731 (2d Cir. 1998).*

Further, we affirm the district court's dismissal of Baltia's section 17A(b)(6) claim. Section 17A(b)(6) does not provide a private right of action. See *Cort v. Ash, 422 U.S. 66, 45 L. Ed. 2d 26, 95 S. Ct. 2080 (1975).*

The district court's dismissal of Baltia's remaining federal claims was proper. Baltia failed to allege predicate acts to support a RICO claim, see *18 U.S.C. § 1962*(b) and (d), and the sale required to support a claim based on § 18(a) of the Act was non-existent in this case.

The district court did not commit reversible error. It was not permitted to consider Baltia's Submission, see *Harsco Corp. v. Segui, 91 F.3d 337, 341 n.1 (2d Cir. 1996)*

[*4] (court may review documents cited to and described in the complaint, even if they were not appended to the complaint). Moreover, Baltia's contentions that the district court did not read its brief and improperly interrupted its counsel during oral argument are unsupported by the record.

We do, however, vacate the district court's decision not to impose sanctions and remand this case for findings regarding the imposition or denial of sanctions pursuant to Section 21D(c)(1) of the Act. See *Gurary v. Winehouse, 190 F.3d 37, 47 (2d Cir. 1999)* ("As the statute required the district court to make findings, we have no choice but to remand in order to permit it to do so.").

For the reasons set forth above, the judgment of the district court is AFFIRMED, in part, and VACATED and REMANDED, in part, for proceedings consistent with this summary order.

BEFORE THE UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

Baltia Airlines,

Plaintiff,

CIBC Oppenheimer,

Defendant

FINDINGS OF FACT AND CONCLUSIONS OF LAW FROM THE RECORD

Before: HON. ALVIN K. HELLERSTEIN,
District Judge

Ms. Lewis, I hold that you have no standing to sue or complain against Oppenheimer under the clearing agreement. The clearing agreement is between Hornblower and Oppenheimer and you may not invoke it.

I hold along with the appellate division on the merits and because of collateral estoppel that there was no fraud of your client under the public disclosure statement.

I hold that you have no right to invoke the clearing agency as a basis for suit.

I hold that you have no basis to complain for a violation of the National Clearing System.

The appellate division has spoken on the issue of contract, whether unilateral or promissory estoppel or anything else. You are not a party to the contract.

You are [not] entitled to have the third-party beneficiary status under the contract.

I hold you have not stated a claim for interference with contract. The contract is a normal clearing contract between Hornblower and Oppenheimer and is a right on the part of the clearing agent to decide for itself whether or not it will want to become a clearing agent for the customer. They can take a customer for itself.

I am now up to page 31 of your complaint.

There is no right under a client's part to be a third-party beneficiary. The appellate division so holds both on collateral estoppel and on the merits. I hold that you have no standing to be a third-party beneficiary.

I have already ruled - - I am now up to page 70 of the complaint - - that you have not appropriately alleged a fraud in connection with the securities transaction and therefore you cannot invoke Section 10(b) of the Exchange Act or Rule 10(b)(5) or 18(a) thereunder.

Furthermore, I do not believe that you have properly alleged a predicate acts or other constituent parts of RICO.

I have gone through your complaint. I find the complaint lacks merit.

I grant the motion to dismiss.

These are the conclusions. It will be issued this afternoon or Monday.

Mr. Schaffer's motion for sanctions is denied.

Thank you all.

(Proceeding adjourned)

BEFORE THE UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

Baltia Airlines,

SUMMARY ORDER

Plaintiff,

00 CIB. 678 (AKH)

CIBC Oppenheimer,

Defendant

Before: HON. ALVIN K. HELLERSTEIN, U.S.D.J.:

The parties appeared for oral argument on defendants' motion to dismiss the Amended Complaint pursuant to Rules 9(b), 12(b)(1) and 12(b)(6) of the Federal Rules of Civil Procedure as well as Section 21D(b)(3)(A) of the Private Securities Litigation Reform Act of 1995. For the reasons stated on the record during argument, this case is dismissed on merits and on the grounds of collateral estoppel. The Clerk of the Court shall mark this matter closed.

SO ORDERED.

Dated: New York, New York
June 14, 2000

ALVIN K. HELLERSTEIN
United States District Judge

Appearances

STEFFANIE LEWIS
STEVEN ORLIKOFF
Attorneys for Plaintiff
FREDERICK P. SCHAFFER
MARTIN ZERWITZ

In the Matter of Baltia Air Lines, Inc., Appellant, v. CIBC Oppenheimer Corp., et al., Respondents.

Mo. No. 1148

COURT OF APPEALS OF NEW YORK

95 N.Y.2d 767; 742 N.E.2d 123; 2000 N.Y. LEXIS 3530; 719 N.Y.S.2d 647

November 21, 2000, Decided

NOTICE: DECISION WITHOUT PUBLISHED OPINION

OPINION: Motion for leave to appeal denied with one hundred dollars costs and necessary reproduction disbursements.

2000 N.Y. App. Div. LEXIS 8778,
In the Matter of Baltia Air Lines, Inc. v. CIBC Oppenheimer Corp.

M-4207

SUPREME COURT OF NEW YORK, APPELLATE DIVISION, FIRST DEPARTMENT

2000 N.Y. App. Div. LEXIS 8778

August 10, 2000, Filed, Entered
NOTICE: DECISION WITHOUT PUBLISHED OPINION

JUDGES: Tom, J.P., Wallach, Rubin, Saxe, Buckley, JJ.

OPINION: Reargument or other relief denied.

In the Matter of Baltia Air Lines, Inc., Appellant, v. CIBC Oppenheimer Corp. et al., Respondents.

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SUPREME COURT OF NEW YORK, APPELLATE DIVISION, FIRST DEPARTMENT

273 A.D.2d 55; 709 N.Y.S.2d 54; 2000 N.Y. App. Div. LEXIS 6372

June 8, 2000, Decided
June 8, 2000, Entered

COUNSEL: For Plaintiff-Appellant: Steffanie Lewis.

For Defendants-Respondents: Frederick P. Schaffer.

JUDGES: Concur--Tom, J. P., Wallach, Rubin, Saxe and Buckley, JJ.

OPINION: Order, Supreme Court, New York County (Ira Gammerman, J.), entered May 13, 1999, which denied plaintiff's motion pursuant to CPLR 3217 (b) for leave to voluntarily discontinue this action without prejudice, and granted defendants' cross motion to dismiss the complaint pursuant to CPLR 3211 (a) (7), unanimously affirmed, with costs.

This action arises from the disruption of the scheduled initial public offering of the securities of plaintiff, a start-up airline, which resulted from the refusal by defendant CIBC Oppenheimer Corp. (Oppenheimer), the exclusive

clearing agent for plaintiff's underwriter (Hornblower), to clear transactions for the offering. To the extent the complaint is based on the contention that Oppenheimer's refusal to clear transactions in securities issued by plaintiff constituted a breach of the clearing agreement between Oppenheimer and Hornblower, plaintiff has no standing to sue for such alleged breach as a third-party beneficiary of the clearing agreement, the express terms of which negate any implication of third-party beneficiary rights (*see, Bordereaux v Salomon Smith Barney Holdings*, 269 AD2d 217, 218, citing *Fitzpatrick Constr. Corp. v County of Suffolk*, 138 AD2d 446, 449-450, *lv denied in part and dismissed in part* 73 NY2d 807). In any event, Oppenheimer's refusal to clear transactions in securities issued by plaintiff was authorized by the clearing agreement, which expressly entitled Oppenheimer to refuse to execute particular transactions and to prohibit Hornblower from underwriting particular securities. Hornblower's disclosure to plaintiff of its clearing relationship with Oppenheimer, as required by the clearing agreement, did not give rise to a contract or promissory estoppel between plaintiff and Oppenheimer, since the disclosure, which is alleged to have been substantially in the form of an attachment to the clearing agreement, did not include any clear and unambiguous promise by Oppenheimer to clear any particular transaction or group of transactions, and did not spell out any specific performance by a prospective customer that would create a contract between that customer and Oppenheimer. The omission of the disclosure of the clearing relationship to state that Oppenheimer had the right to refuse to clear any particular transaction was not

fraudulent, since nothing in the alleged disclosure was expressly or implicitly inconsistent with Oppenheimer having such a right, and no facts are alleged that could have given rise to a duty obligating Oppenheimer to disclose to plaintiff that it had such a right under the clearing agreement.

We reject plaintiff's remaining arguments concerning the legal sufficiency of the complaint. We note that plaintiff has failed to identify any breach by Hornblower of its underwriting agreement with plaintiff that could support a cause of action against Oppenheimer for tortious interference with contract (*see, e.g., Snyder v Sony Music Entertainment*, 252 AD2d 294, 299). With regard to plaintiff's arguments concerning the Securities Exchange Act of 1934, as amended (15 USC §§ 78a [the Exchange Act]), any claim for violation of the Exchange Act is subject to the exclusive jurisdiction of the Federal courts (see, 15 USC §§ 78aa), and plaintiff's argument that the provision of the clearing agreement barring enforcement by third parties is void as contrary to the Exchange Act is unsupported by citation of any provision of the Act or regulations promulgated thereunder inconsistent with such contractual provision. Finally, plaintiff's motion to discontinue the action without prejudice was correctly denied, since such relief was plainly sought in order to avoid an adverse decision on the merits (*see*, NBN Broadcasting v Sheridan Broadcasting Networks, 240 AD2d 319).

Concur—Tom, J. P., Wallach, Rubin, Saxe and Buckley, JJ.

Baltia Air Lines, Inc., Plaintiff-Appellant-Cross-Appellee, v. CIBC Oppenheimer Corp., and Canadian Imperial Bank of Commerce, Defendants-Appellees-Cross-Appellants.

Nos. 00-7867, 00-7883 (XAP)

UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

6/1/01

ORDER

Petition for rehearing denied.

Supreme Court, U.S.
FILED
FEB 15 2002
OFFICE OF THE CLERK

No. 01-909

IN THE

Supreme Court of the United States

BALTIA AIRLINES, INC.,

Petitioner,

v.

CANADIAN IMPERIAL BANK OF COMMERCE and CIBC OPPENHEIMER CORPORATION,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF IN OPPOSITION

HOWARD O. GODNICK
Counsel of Record
BENJAMIN E. GEYERHAHN
SCHULTE ROTH & ZABEL LLP
919 Third Avenue
New York, NY 10016
(212) 756-2000

Attorneys for Respondents

172333

COUNSEL PRESS
(800) 274-3321 • (800) 359-6859

4HR

QUESTIONS PRESENTED

Does Baltia Air Lines, Inc. ("Baltia") have a private right of action under § 17A(b)(6) of the Securities Exchange Act of 1934 (the "Exchange Act"), 15 U.S.C. § 78q-1(b)(6) (2000) ("Section 17A(b)(6)"), if that statute provides no express right of action and its legislative history indicates that the Securities and Exchange Commission ("SEC") would be responsible for the statute's enforcement?

Does Baltia have standing to assert that the Clearing Agreement violates Section 17A(b)(6) and, therefore, is voidable under § 29(b) of the Exchange Act, 15 U.S.C. § 78cc(b) ("Section 29(b)"), even though Baltia was not a party to the agreement, and the conduct about which Baltia complains is not proscribed by the statute?

PARTIES TO THE PROCEEDING AND RULE 29.6 STATEMENT

Canadian Imperial Bank of Commerce ("CIBC")[1] and CIBC Oppenheimer Corporation ("Oppenheimer") are the respondents and the defendants in the action below.[2] Oppenheimer is a wholly owned subsidiary of CIBC. CIBC has no parent corporation and no publicly held company owns 10% or more of its stock.

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1. In the complaint below, Baltia has made no substantive allegations against CIBC. It alleged that CIBC is liable as a "control person" of Oppenheimer under § 20 of the Securities and Exchange Act of 1934, 15 U.S.C. § 78t.

2. In its petition, Baltia has named CIBC World Markets, CIBC Wood Gundy Securities, Inc., CIBC AeroGold Visa, CIBC AeroCorporate Visa, CIBC AeroMortgage and Aeroplan Frequent Flyer Program as Co-Respondents in this action. (Petition ii). None of these parties, however, were named in the complaint filed in this action and none are mentioned in the record below.

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Respondents Canadian Imperial Bank of Commerce and CIBC Oppenheimer Corporation respectfully oppose the petition for writ of certiorari filed by Baltia Air Lines, Inc. in this memorandum.

OPINIONS BELOW

The decision of the district court, Hon. Alvin K. Hellerstein U.S.D.J., is not reported and there is no formal written opinion. Judge Hellerstein's order dismissing the complaint specifically cites the reasons set forth at the hearing as the basis for the dismissal. (Pet. App. 8a-9a). The relevant portions of the transcript of the motion to dismiss hearing are set forth at Resp. App. 1a-9a.[3] The Second Circuit's decision is included in the appendix of Baltia's petition for writ of certiorari.

STATEMENT OF THE CASE

This is an unremarkable contract case that was first dismissed in state court, and then was recast as a federal securities claim and dismissed in federal court. No state or federal court that has been presented with the allegations of this case has found any claim upon which Baltia may recover, and there is no reason for this Court to devote its resources to hearing this case. Indeed, Baltia fails to present a single acceptable reason why this Court should hear this case. Ignoring Supreme Court Rule 10, Baltia concedes that the decision of the Second Circuit Court of Appeals in this case is not in conflict with the decision of any other court. (*See* Petition 12). This is unsurprising given that the Second Circuit's decision that no private right of action

3. Citations to "Petition" refer to Baltia's Petition for writ of certiorari. Citation to "Pet. App." refer to the Petition's appendix and citations to "Resp. App." refer to the appendix to this Opposition to Petition of writ of Certiorari.

exists under Section 17A(b)(6) is consistent with this Court's precedent, spanning decisions from *Cort v. Ash*, 422 U.S. 66 (1975) to the more recently decided *Alexander v. Sandoval*, 532 U.S. 275, 121 S. Ct. 1511 (2001).

Furthermore, the Second Circuit's dismissal of Baltia's claim under Section 29(b), which allows a party to render void a contract that violates the Exchange Act, is unremarkable. The Second Circuit held that Baltia was barred by the doctrine of collateral estoppel from arguing that it had standing to challenge the clearing agreement (the "Clearing Agreement") between Oppenheimer and Hornblower & Weeks ("H&W") (Baltia's underwriter and investment banker) because in a prior litigation involving the same parties, a New York State Supreme Court, New York County determined that Baltia was a third-party without rights under the Clearing Agreement. Without standing, Baltia had no basis to void the Clearing Agreement under Section 29(b).

In any event, there is no basis for liability under Section 29(b) or 17A(b)(6) because the conduct about which Baltia complains is not proscribed by either statute.

A. Procedural History

On February 8, 1999, Baltia brought an action in New York State Supreme Court, New York County (the "State Court Action") to enforce purported rights arising out of the Clearing Agreement between Oppenheimer and a third-party, H&W, so that an initial public offering of its common stock (the "Baltia IPO") could be completed. The court rejected Baltia's claim, holding that Baltia could not compel action under the Clearing Agreement because it was not a party to that agreement, and later dismissed Baltia's complaint for

the same reason. The dismissal was unanimously affirmed by the Appellate Division of the Supreme Court, First Department ("Appellate Division"). (Pet. App. 12a-15a). Leave to appeal to the New York Court of Appeals was denied. (Pet. App. 10a, 11a).

Having failed in state court, Baltia filed an action in the United States District Court for the Southern District of New York on January 31, 2000 (the "Federal Action"). In addition to reasserting the claims rejected in the State Court Action, Baltia asserted claims under §§ 10(b), 18(a), 17A(b)(6), and 29(b) of the Exchange Act and claims under the Racketeer Influence and Corrupt Organization Act, 18 U.S.C. § 1962, *et seq.* (2000) ("RICO"). The court dismissed all of Baltia's claims during oral argument on the motion dismiss. It also held that Baltia was collaterally estopped from arguing that it was either a party to the Clearing Agreement or a third party beneficiary of that agreement as that issue had been argued and resolved in the State Court Action. (Pet. App. 6a-7a). The court dismissed Baltia's claim under Section 29(b) because Baltia could not argue that it was a party to the Clearing Agreement, and it dismissed Baltia's claim under Section 17A because there is no private right of action under that statute. (Resp. App. 6a-8a). By an unpublished decision dated April 25, 2001, the Second Circuit affirmed the District Court's decision in all respects, except that it vacated "the district court's decision not to impose sanctions [against Baltia] and remand[ed] the case for findings regarding the imposition or denial of sanctions pursuant to Section 21D(c)(1) of the Act." (Pet. App. 5a). Subsequently, Baltia filed its petition for a writ of certiorari.[4]

4. Respondents' opposition was originally due January 25, 2002, but at Respondents' request, the Court extended the time to file an opposition to February 15, 2002.

B. Statement of Facts[5]

Oppenheimer provides a broad array of financial services to its clients, including clearing services.[6] H&W (not Baltia) contracted for Oppenheimer's clearing services by a Clearing Agreement between Oppenheimer and H&W dated June 11, 1996.[7]

1. The Clearing Agreement

The Clearing Agreement provides that Oppenheimer "reserves the right to refuse to execute any transactions entered into for a customer account" and "reserves the right to reject any account that [H&W] may tender to [Oppenheimer]." With specific reference to the issuance or placement of securities, the type of transaction involved in the Federal Action, the Clearing Agreement provides (with emphasis added):

> [H&W] shall provide to [Oppenheimer] a written list of securities to which [H&W] intends to enter into, or join, a syndicate (whether as part of the underwriting or selling group) relating to the issuance or placement of those securities.

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5. The quoted contracts, transcripts and other documents quoted to or referred to herein are contained in the Record on Appeal to the Second Circuit in this matter.

6. Clearing services are the physical transfer and distribution of equities and other investment vehicles purchased and sold by broker dealer's customers.

7. At the time Oppenheimer entered in the Clearing Agreement with H&W, the latter company was named Baker Weeks & Co., Inc.

> [Oppenheimer] *shall have the right to limit or prohibit [H&W's] syndicate activities with respect to any security. Under no circumstances may [H&W] join a syndicate without the prior written approval of [Oppenheimer].*

Accordingly, H&W granted Oppenheimer the express right under the Clearing Agreement to refuse to provide clearing services in connection with any account, and to prohibit H&W from serving as an underwriter for the issuance of any securities without its prior approval.

In addition, the Clearing Agreement provides that "[Oppenheimer's] sole responsibility and liability is expressly provided by the agreement and limited to [H&W]." Thus, Oppenheimer and H&W agreed that the Clearing Agreement was not intended to benefit anyone who was not a party to it, and that no one other than H&W could claim rights against Oppenheimer under the Clearing Agreement.

2. H&W Agrees To Underwrite Baltia's IPO

In June 1998, Baltia contracted with H&W to underwrite its IPO. At or about that time, in accordance with the requirement of Rule 382(c) of the New York Stock Exchange,[8] H&W disclosed to Baltia the existence of its clearing relationship with Oppenheimer by providing Baltia something substantially in the form of the model disclosure statement that is attached to the Clearing Agreement (the "Disclosure Statement").

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8. NYSE Rule 382(c) provides that "[e]ach customer whose account is introduced on a fully disclosed basis shall be notified in writing upon the opening of the account of the existence of the agreement and of the relationship between the introducing and carrying organization."

3. Oppenheimer Exercises Its Express Contract Rights

Baltia did not allege in its complaint, nor does it argue in its Petition, that H&W ever received written permission from Oppenheimer to underwrite Baltia's IPO — as required by the Clearing Agreement. Additionally, Baltia neither argues nor alleges that Oppenheimer was informed that H&W had agreed to underwrite Baltia's IPO until late January 1999, when H&W first requested that Oppenheimer provide clearing services for the transaction, which was then scheduled for early February 1999. In response to H&W's request, Oppenheimer advised H&W on or about February 1, 1999 that Oppenheimer was exercising its contractual right to refuse to serve as the clearing agent for Baltia's IPO. H&W, in turn, informed Baltia that it could not proceed with the IPO. Baltia then commenced the State Court Action.

4. The Petition Includes Several Facts Not In The Record Below

This case was resolved on a motion to dismiss. Rather than amend its complaint in an attempt to cure the defects of its claims, however, Baltia has repeatedly tried to introduce facts into the record that are neither relevant to this case nor properly before the Court. The Petition is littered with "facts" that are either not included in the record below or which were part of a record specifically excluded by the District Court. (*See* Resp. App. 2a-5a). Specifically, the district court excluded a large volume of documents that, among other things, purported to demonstrate CIBC's financial interests in various competitors of Baltia. (*See id.*) The assertions in the Petition suggesting that Oppenheimer declined to clear the Baltia transaction because it had a financial interest (such as those at Petition 8, 20 n.22) in Baltia's competitors are

found nowhere in Baltia's complaint and are not present in the record below. Additionally, CIBC Wood Gundy Securities, Inc., CIBC AeroGold Visa, CIBC AeroCorporate Visa, CIBC AeroMortgage, and CIBC Frequent Flyer Program whom Baltia names as respondents are not named as parties to this action nor do their names appear anywhere in the record below.

Baltia also refers to a conversation with Melvin Weis, Esq., (*see* Petition 7), which is nowhere in the record below and irrelevant. Indeed, nothing from the first full paragraph of page seven to the end of the first full paragraph of page eight of the Petition can be found in the record below, and nothing in the first full paragraph on page nine of the Petition is in the record below.

REASONS FOR DENYING THE WRIT

I. BALTIA PROVIDES NEITHER A BASIS FOR GRANTING ITS PETITION NOR A BASIS FOR CREATING A PRIVATE RIGHT OF ACTION UNDER SECTION 17A(b)(6) OF THE EXCHANGE ACT

Baltia fails to argue that this case meets even the basic requirements of Supreme Court Rule 10, which articulates the types of cases this Court will hear. Instead, Baltia makes a series of policy arguments as to why the Second Circuit erred in denying Baltia a private right of action under Section 17A(b)(6) without a single citation to any authority that supports those arguments. (*See* Petition 12-22). In doing so, Baltia ignores both Supreme Court Rule 10 and a well established line of Supreme Court cases that dictated the Second Circuit's decision in this case that no private right of action exists under Section 17A where there is no evidence of a congressional intention to create such a right.

A. The Petition Fails to Identify Any Basis for Granting Certiorari Under Supreme Court Rule 10

As Chief Justice Rehnquist previously noted, the Court can accept only a fraction of the thousands of petitions for certiorari made every term. It, therefore, hears only the cases that demand its intercession. *See Hubbard v. United States*, 514 U.S. 695, 720 (1995) (Rehnquist C.J., dissenting). Supreme Court Rule 10 articulates the types of circumstances under which the Court grants certiorari:

> (a) a United States court of appeals has entered a decision in conflict with the decision of another United States court of appeals on some important matter; has decided an important federal question in a way that conflicts with a decision by a state court of last resort; or has departed from the accepted and usual course of judicial proceedings, or sanctioned such a departure by a lower court, as to call for an exercise of the Court's supervisory power;
>
> . . .
>
> (c) . . . a United States court of appeals has decided an important question of federal law that has not been, but should be, settled by this Court, or has decided an important federal question in a way that conflicts with relevant decisions of this Court.

Sup. Ct. Rule 10.

Baltia fails to identify a decision by any court that conflicts with decision of the Second Circuit in this case. To the contrary, Baltia acknowledges that Section 17A(b)(6) has not been interpreted by a federal court at any level. (Petition 12) ("No court has reviewed the rights devolving from subsection (6) to § 17A(b) of the [Exchange Act]"). Baltia also neglects to mention that, this Court has already declined invitation to review the only decision by a lower court that reviewed the language and legislative history of Section 17A and held that no private right of action exists thereunder. *Brawer v. Options Clearing Corp.*, 633 F. Supp. 1254 (S.D.N.Y.), *aff'd*, 807 F.2d 297 (2d Cir. 1986), *cert. denied*, 484 U.S. 819 (1987). The Court's decision not to hear *Brawer* is consistent with its policy of declining to hear cases in the absence of a conflict in federal decisional law created by the decision being appealed. *See Hubbard*, 514 U.S. at 720 ("[O]rdinarily a court of appeals decision interpreting one of our precedents — even one deemed to be arguably inconsistent with it — will not be reviewed unless it conflicts with a decision of another court of appeals.") A policy which militates strongly against the Court's granting certiorari in this case.

B. There Is No Basis for Finding a Private Right of Action Under Section 17A of the Exchange Act

Section 17A(b)(6) provides that "no registered clearing agency shall prohibit or limit access by any person to services offered by any participant therein." 15 U.S.C. § 78q-1(b)(6). As demonstrated below and again herein, both the plain language of the statute and its legislative history indicate that Congress intended for the SEC to enforce it; and nothing in the statute or in its legislative history indicates any congressional intent for Section 17A(b)(6) to be enforced

by a private right of action. Absent this, a private right of action may not be derived. *See Alexander*, 121 S. Ct. 1511, 1519-20.

Baltia offers nothing to dispute this analysis. It analyzes neither the language of the Section 17A(b)(6), nor its legislative history. It fails even to discuss that Supreme Court precedent which contemplates when a federal court may create a private right of action under a federal statute. It chooses instead to make a series of unsubstantiated policy arguments that cannot serve as a basis upon which to create a private right of action from Section 17A(b)(6). (Petition 12-22).

1. Recent Supreme Court Decisions Demand Clear Congressional Intent as a Prerequisite for Creating a Private Right of Action

A federal court may not derive a private right of action from a federal statute unless Congress intended to create such a right, and that intent is evident either in the plain language of the statute or in its legislative history. *See Alexander*, 121 S. Ct. at 1519-20 (holding that a federal court may only derive a private right of action from a federal statute when Congress has expressed an intention to create such a right); *Transamerica Mortgage Advisors, Inc. v. Lewis*, 444 U.S. 11, 17-19 (1979); *Touche Ross & Co. v. Reddington*, 442 U.S. 560, 571 (1979); *Cort*, 422 U.S. at 73. Moreover, when the plain language of a statute does not explicitly provide for a private right of action, the Court will only infer such a right if congressional intent indicates that the statute was intended to create "not just a private right, but also a private remedy." *Alexander*, 121 S. Ct. at 1519. This narrow view of statutory construction is intended to curb the creation of private rights of action by the federal courts. *See id.* at 1520.

Recently, the Court offered stern warnings against lower courts wandering beyond the limitations of congressional intent when interpreting federal statutes. In *Alexander v. Sandoval*, the Court held that "[r]aising up causes of action where a statute has not created them may be a proper function for common-law courts, but not for federal tribunals." 532 U.S. 275, 121 S. Ct at 1520. The *Alexander* Court warned the lower courts not to venture beyond congressional intent when analyzing federal statutes to determine whether or not to create a private right of action to enforce those statutes.

> The judicial task is to *interpret the statute* Congress has passed to *determine whether it displays an intent to create not just a private right but also a private remedy*. Without it, a cause of action *does not exist and a court may not create one*, no matter how desirable that might be as a policy matter, or how compatible with the statute.

Id. at 1520 (emphasis added).

Here, Baltia's only justifications for its request that the Court create a private right of action are its own unsubstantiated policy arguments. (*See* Petition 12-22). The mandates of *Alexander* indicate that such policy arguments are hopelessly insufficient.

2. The Statutory Language and Legislative History of Section 17A Provide No Support For the Derivation of a Private Right of Action by this Court

Neither the plain language nor the legislative history of Section 17A(b)(6) suggest that Congress intended to create a private right of action or a private remedy for violations of

the statute. Quite the contrary, a measured analysis of legislative intent indicates that Congress meant for Section 17A(b)(6) to be enforced by the SEC. In 1975, Congress amended the Exchange Act, adding Section 17A and several other statutes — including §§ 6, 19(g) and (h) and 21(d) and (c) (the amendments shall be referred to collectively as the "1975 Amendments"). In adding these amendments, Congress intended that the SEC "would play a much larger role than it [had] in the past to ensure there is no gap between self-regulatory performance and regulatory need." Senate Committee on Banking, Housing and Urban Affairs, S. Rep. No. 75, 95th Congr., 1st Sess. 23, *reprinted in* 1975 U.S.C.C.A.N. 179, 181 (referred to hereinafter as the "Senate Report"). The plain language of these amendments bear out this intention.

The amended Section 6 requires the registration of exchanges and self-regulatory organizations ("SRO") (e.g. NASD), and specifically empowers the SEC to regulate them. *See* 15 U.S.C. § 78f. Similarly, Section 17A requires that clearing agents be registered and subjects them to SEC scrutiny.

> (3) A clearing agency shall not be registered unless the [SEC] determines that —
>
> > (A) Such clearing agency is so organized and has the capacity to be able to facilitate the prompt and accurate clearance and settlement of securities transactions and derivative agreements, contracts and agreements for which it is responsible, to safeguard securities and funds in its custody or control or

> for which it is responsible to comply with the provisions of this chapter and the rules and regulations thereunder, to enforce (subject to any rule or order of the Commission pursuant to Section 78g(d) or 78s(g)(2) of this title) compliance by its participants with the rules of the clearing agency, and to carry out the purposes of this section.

15 U.S.C. § 78q-1(b)(3)(A). Finally, in Section 19 (which was part of the 1975 Amendments) Congress gave the SEC responsibility for enforcing this statutory scheme. Under Section 19(h)(1), the SEC is authorized to suspend or revoke the license of an SRO, exchange or clearing agent, or suspend any of the privileges conferred by that license "for the protection of investors, or otherwise in furtherance of the purposes of this chapter." 15 U.S.C. § 78s(h)(1). The SEC may exercise this power when a clearing agent or SRO violates the federal securities laws, the SEC Rules, the governing SRO's rules, or the internal rules of either the SRO or the clearing agent in question. *Id.* Thus, although the 1975 Amendments created new federal laws that protect investors, Congress intended for these laws to be enforced by the SEC.

Furthermore, Congress has acknowledged that the 1975 Amendments were intended to "significantly increase the regulatory options available to [the SEC] to deal with . . . perceived self-regulatory shortcomings." Senate Report, at 212.

> Although *self-regulation has not always performed up to expectations, on the whole it has worked well, and the Committee believes it should*

> *be preserved and strengthened. [The Amendments are] designed to accomplish this*, not only by clarifying regulatory responsibilities at all levels but also by assuring that the self-regulatory organizations follow effective and fair procedures, that their activities are not anti-competitive and that the Commission's oversight powers are ample and its responsibility to correct self-regulatory lapses is unmistakable.

Senate Report, at 201-02 (emphasis added).

Finally, when analyzing congressional intent to determine whether a private right of action may be derived, a court must consider whom the statute was intended to protect. *See e.g. Alexander*, 121 S. Ct. at 1521; *California v. Sierra Club*, 451 U.S. 287, 293 (1981); *Cort*, 422 U.S. at 80. Statutory language expressing an intention to protect a specific individual or class of individuals may be indicative of congressional intent to create a private right of action for that protected group. Conversely, when the focus of a statute is on regulating an entity or class of entities, and not on protecting a specific class of individuals, the Court has held that it will not infer an intent to provide a private right of action for any class of individuals. *Sierra Club*, 451 U.S. at 293-94; *see also Alexander*, 121 S. Ct. at 1521.

For example, in *Sierra Club*, the Ninth Circuit Court of Appeals had affirmed a decision by a district court that allowed citizens via a private right of action to enforce a federal statute prohibiting the construction of certain waterway obstructions. The Court reversed the Ninth Circuit's decision, reasoning that nothing in the federal statute indicated that it was for the benefit of any individual or class

of individuals, thus, no private right of action could be created.

> [T]he statute states no more than a general proscription of certain activities; it does not unmistakably focus on any particular class of beneficiaries whose welfare Congress intended to further. Such language does not indicate an intent to provide for private rights of action.

451 U.S. at 294.

While this Court has held that provisions of the Exchange Act are intended to protect investors, *see Virginia Bankshares, Inc. v. Sandberg*, 501 U.S. 1083, 1103-04 (1991), no court has ever held that any of the provisions of Section 17A were intended to protect issuers. Nothing in Section 17A indicates that Congress intended for this statute to provide protection to issuers. Accordingly, there is no basis to conclude that Congress intended for this statute to create a private right of action for issuers.

"[W]hen Congress wished to provide a private damages remedy, it knew how to do so expressly." *Touche*, 442 U.S. at 572. Although Congress' failure to explicitly provide a private right of action is not dispositive, *see Transamerica*, 444 U.S. at 19, the Senate Report and the plain language of Section 17A and the other 1975 Amendments indicate that Congress intended the laws it created to be enforced by the SEC. In the face of this, Baltia offers no contrary argument, or points to a single iota of evidence, either in Section 17A's language or its legislative history, that Congress intended Section 17A to be enforced by anyone other than the SEC. Baltia, instead, focuses on what it believes the law "should"

be as a policy matter. In *Alexander*, the Court held that in the absence of specific Congressional intent to create a private right of action, courts may not create such a right "no matter how desirable that might be as a policy matter." 121 S. Ct. at 1519-20.

C. The Court Has Declined To Grant Certiorari in a Case Involving Similar Facts.

In *Brawer v. Options Clearing Corp.*, 633 F. Supp. 1254 (S.D.N.Y.), *aff'd*, (2d Cir. 1986), 807 F.2d 297, *cert. denied*, 484 U.S. 819 (1987), the Court declined to review a case in which a district court held that no private right of action existed under Section 17A. In that case, an investor sued a clearing agent for failure to follow its own internal policies, which is prohibited under Section 17A. The district court concluded that while Section 17A was enacted for the benefit of investors, the plain language of the statute and its legislative history evinced no congressional intent to create a private right of action; therefore, there was no basis for holding that a private right of action existed under Section 17A. *Id.* at 1258-61. The Second Circuit affirmed this decision, and the Court denied the investor's petition for writ of certiorari. *Id.*

The Court should similarly deny Baltia's petition. The same statute and legislative history are presented in this case that were presented in *Brawer*. In *Brawer*, the petitioner was an investor (a person within the class of people the statute was intended to protect), unlike here where the petitioner is an issuer, and not even Baltia argues that issuers are among the class of individuals Congress intended to protect by it passage of Section 17A.

II. BALTIA HAS NO CLAIM UNDER SECTION 29(b) OF THE EXCHANGE ACT BECAUSE IT WAS NOT A PARTY TO THE CONTRACT THAT IT ALLEGES VIOLATES SECTION 17A(b)(6), AND OPPENHEIMER DID NOTHING TO VIOLATE SECTION 17A(b)(6)

Baltia already litigated whether it was a party to the Clearing Agreement in the State Court Action, and both the trial and appellate courts held in that case that Baltia was not a party to the Clearing Agreement, could not benefit from its terms, and, thus, had no standing to challenge it. Because this issue was litigated in a prior suit, the State Court Action, both the district court and the Second Circuit held that Baltia was precluded from arguing that it was a party to the Clearing Agreement, (*see* Pet. App. 3a-4a, Resp. App. 8a), and, therefore, had no recourse under Section 29(b), which allows a party to void a contract that violates the Exchange Act. 15 U.S.C. § 78cc(b).[9] In any event, neither the terms of the Clearing Agreement nor Baltia's actions violated Section 17A(b)(6) so there is no basis for imposing liability under Section 29(b).

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9. It is worth noting that even if Baltia could claim a remedy under Section 29(b), such remedy would be of no benefit to it. The exclusive remedies available under Section 29(b) is rendering the contract void or rescinding. *See Greater Iowa Corp. v. McLendon*, 378 F.2d 783, 792 (8th Cir. 1967); *Natkin v. Exch. Nat'l Bank*, 342 F.2d 675, 676-77 (7th Cir. 1965). Neither rescission nor voiding the Clearing Agreement benefits Baltia in any way. If it cannot be awarded damages or compel Oppenheimer to clear the transaction its position is unchanged because it cannot complete its IPO.

A. Baltia Is Collaterally Estopped from Arguing that It Is a Party to the Clearing Agreement

Baltia is precluded by the doctrine of collateral estoppel from arguing that it was a party to or a beneficiary of the Clearing Agreement. That issue was already litigated and resolved by Baltia in the State Court Action where both the trial court and the appellate court held that Baltia was not a party to the Clearing Agreement and, therefore, could not benefit from it. Because this issue were necessarily resolved in a previous litigation, the District Court and the Second Circuit were precluded from revisiting it, *see Kremer v. Chemical Constr. Corp.*, 456 U.S. 461, 466 n.6 (1982), and both courts acknowledged as much. (*See* Resp. App. 8a, Pet. App. 3a-4a).

The New York State Supreme Court in the State Court Action held specifically that Baltia was not a party to the Clearing Agreement. The Appellate Division affirmed this decision holding:

> To the extent the complaint is based on the contention that Oppenheimer's refusal to clear transactions in securities issued by plaintiff constituted a breach of the clearing agreement between Oppenheimer and [H&W], plaintiff *has no standing to sue as a third party beneficiary of the clearing agreement*[.]

(Pet. App. 13a). The issue of Baltia's status vis-à-vis the Clearing Agreement was, therefore, decided in the State Court Action.

"[O]nce an issue is actually and necessarily determined by a court of competent jurisdiction, that determination is conclusive in subsequent suits based on a different cause of action involving a party to the prior litigation." *Montana v. United States*, 440 U.S. 147, 153 (1979) (citing *Parklane Hosiery v. Shore*, 439 U.S. 322, 326 n.5 (1979)). Where a party has had a full and fair opportunity to litigate an issue in court, it will not be heard to raise that issue in a subsequent litigation. Respecting a prior courts decisions promotes judicial economy and spares parties the burden and cost of relitigating issues already resolved. *See id.*; *Kremer*, 456 U.S. at 466 n.11. Baltia has given this Court no basis to revisit these settled principals.

Here, Baltia asks the Court to render void the Clearing Agreement under Section 29(b). It can, however, only challenge an agreement to which it was a party. Baltia had a full and fair opportunity to litigate whether it was a party to the Clearing Agreement in a prior litigation — the State Court Action, and both the trial court and the appellate court in the State Court Action held that Baltia was not a party to the Clearing Agreement. (Pet. App. 10a, 11a, 13a). Because this issue was resolved in a prior litigation, both the District Court and the Second Circuit refused to revisit the issue, (*see* Resp. App. 8a, Pet. App. 4a), and there is no basis for this Court to reach a different result, and Baltia offers none.

B. The Clearing Agreement Does Not Violate Section 17A(b)(6), Nor Did Oppenheimer's Exercise of Its Rights Under that Agreement Violate Section 17A(b)(6)

Finally, Baltia has no basis to void the Clearing Agreement under Section 29(b) because the Clearing Agreement does not violate Section 17A(b)(6). Similarly, Oppenheimer's exercise of its rights under that agreement did not violate Section 17A(b)(6). Baltia's claim that it has a basis to void the agreement, therefore, cannot be sustained, and its petition should be denied.

Section 17A(b)(6) provides that "[n]o registered clearing agency shall prohibit or limit access by any person to services offered by any participant therein." 15 U.S.C. § 78q-1(b)(6). For Oppenheimer to violate this section, it must prohibit or limit access by a person to services offered by a "participant." A participant is defined as "any person who uses a clearing agency to clear or settle securities transactions. . . . Such term does not include a person whose only use of a clearing agency is . . . through another person who is a participant. . . ." 15 U.S.C. § 78c(a)(24). Thus, participant refers not to the clearing agent's ultimate customers, in this case Baltia, but to the clearing agency's introducing brokers, in this case H&W. Accordingly, Section 17A(b)(6) prohibits a clearing agent from prohibiting or limiting access to those services offered by its introducing brokers, but does not prevent a clearing agent from prohibiting or limiting access to its own services.

Applied to the matter at bar, the Clearing Agreement would violate Section 17A(b)(6) if its terms prohibited or limited Baltia's access to services offered by H&W. No such provision exists in the Clearing Agreement, and Baltia points

to none.[10] Similarly, Oppenheimer would only have violated Section 17A(b)(6) if it limited Baltia's access to H&W's services, which Oppenheimer did not do, and Baltia does not allege.

Finally, the Court has held that private rights of action derived from a statute — such as those created by the courts or administrative bodies — cannot be more restrictive than the statute from which they are derived. Accordingly, a party cannot be liable under a derived private right of action unless his behavior violates the original statute. *Central Bank of*

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10. Baltia's unduly broad interpretation of Section 17A(b)(6) is contrary to the plain meaning of the statute and, notably, is unsupported by a single case citation. Furthermore, under Baltia's misreading of the statute, a clearing agency would be unable to refuse to clear *any* trade presented to it by an introducing broker, even if the clearing agency determined that the trade was financial unfeasible, fraudulent or possibly even if the customer lacked available funds to pay for the trade. Discretion over which trades should or should not be cleared would shift from the handful of heavily regulated national clearing agencies to the tens of thousands of less regulated, less capitalized introducing brokers. Given that clearing agencies frequently get named, often (as here) frivolously, in suits involving questionable trading practices, *see e.g. Ross v. Bolton*, 904 F. 2d 819 (2d Cir. 1990); *Connally v. Havens*, 763 F. Supp. 6 (S.D.N.Y. 1991); *Schwarz v. Bear Stearns & Co.*, No. 603795/97, 1998 WL 672708 (Sup. Ct. N.Y. County, Aug. 24, 1998), *aff'd*, 266 A.D.2d 133, 698 N.Y.S.2d 855 (1st Dept. 1999), clearing agencies would be forced to become much more selective in determining the introducing brokers for whom they will clear, simply in order to limit their litigation expenses and possible exposure. Inevitably, the result of this process would be that many of the smaller, less established introducing brokers, such as those that primarily underwrite small initial public offerings or those that provide service to small numbers of individuals, would find themselves without clearing agreements and, thus, would be forced to cease operations.

Denver v. First Interstate Bank of Denver, 511 U.S. 164, 173 (1994). Thus, in *Central Bank*, the Court held that a defendant's acts could not give rise to a violation of Rule 10b-5 — a regulation promulgated by the SEC pursuant to its rulemaking power to enforce Section 10(b) of the Exchange Act — because those acts did not violate Section 10(b) of the Exchange Act. Here, neither the Clearing Agreement nor any act of Oppenheimer violates Section 17A(b)(6), so the remedies available under Section 29 for violations of the Exchange Act cannot attach.

C. Baltia Was Not a Party to the Clearing Agreement, and the Remedies Available Under Section 29(b) Are Unavailable To It

The Court has held that in order to avail oneself of the remedies available under Section 29(b) a litigant must be a party to the contract that it claims to be violative of the Exchange Act.[11] *Mills v. Electric Auto-Lite Co.*, 396 U.S. 375, 388 (1970); *see also Natkin v. Exchange Nat'l Bank of Chicago*, 342 F.2d 675, 676-77 (7th Cir. 1965) ("Although a violation such as here alleged operates to void the contract rights of the party in violation . . . there is nothing in [Section 29(b)] which operates to create any right or cause of action against the party in favor of a stranger to the contract.") In *Mills*, the Court was asked by a group of minority dissenting shareholders to determine whether a merger was properly consummated when a proxy statements were false

11. At least one court has held that recovery under Section 29(b) is predicated on showing (1) that the contract involved a prohibited transaction, (2) that the plaintiff is in contractual privity with the defendant, and (3) the defendant is a class of person that the Exchange Act was intended to protect. *Cohen v. Citibank*, 945 F. Supp. 621, 626 (S.D.N.Y. 1996).

and misleading in violation of Section 14(a) of the Exchange Act. 15 U.S.C. § 78aa(a). The Court held that the minority shareholders had made out a claim under Section 14(a) of the Exchange Act. It, however, further concluded that Section 29(b) provided no basis upon which to void the merger as the minority shareholders were not parties to the merger agreement because they had not voted their proxies in favor of it.[12] *Id.* at 386-88.

Here, Baltia was not a party to the Clearing Agreement, which is the agreement it alleges to be violative of the Exchange Act. The Clearing Agreement is between H&W and Oppenheimer and by its terms is intended exclusively to benefit those parties. No court has held that Baltia was a party to that contract. In fact, a New York State Supreme Court, dismissed Baltia's suit to compel Oppenheimer to perform under the Clearing Agreement — a suit involving the same facts and parties as this case — based on its conclusion that Baltia was not a party to the Clearing Agreement. Baltia offers the Court no reason to reach a different conclusion.

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12. The Court further held that even if the minority shareholders had voted their shares on the misleading proxy statement, the remedy available under Section 14(b), rescinding or voiding their vote, was insufficient to undo the merger because it would be a rescission of only a fraction of the votes for the merger, and, therefore, would lead to no change in the result of the merger vote. *Mills*, 396 U.S. at 388 n.11.

CONCLUSION

For the reasons set forth above, the petition for writ of certiorari should be denied.

Respectfully submitted,

HOWARD O. GODNICK
Counsel of Record
BENJAMIN E. GEYERHAHN
SCHULTE ROTH & ZABEL LLP
919 Third Avenue
New York, NY 10016
(212) 756-2000

Attorneys for Respondents

APPENDIX

APPENDIX — RELEVANT PORTIONS OF TRANSCRIPT DATED JUNE 14, 2000

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

00 Civ. No.: 678 (AKH)

BALTIA AIRLINES,

Plaintiff,

- v -

CIBC OPPENHEIMER,

Defendant.

June 14, 2000
10:20 a.m.

Before:
HON. ALVIN HELLERSTEIN, District Judge

APPEARANCES

STEFFANIE LEWIS
STEVEN ORLIKOFF
Attorneys for Plaintiff

SCHULTE ROTH & ZABEL, LLP
Attorneys for Defendant
FREDERICK P. SCHAFFER
MARTIN ZERWITZ

* * *

MS. LEWIS: Your Honor, I am Steffanie Lewis representing Baltia Airlines.

THE COURT: Yes, Ms. Lewis.

MS. LEWIS: This is why we are here today. This is in your Exhibit Number 2. It is under your tab, maps. This is the route Baltia had from New York to St. Petersburg. These other routes you see serving St. Petersburg are CIBC Oppenheimer's Airlines. Baltia's route is approximately eight hours. These — Baltia's route started in New York. 30 percent of the traffic to St. Petersburg is from New York.

CIBC Oppenheimer Airlines starts from Toronto. They take, minimally, 12, as many as 16 hours. We will show that this alliance of airlines was instrumentally developed by CIBC and the only really viable competition was a non-stop direct route.

This chart shows the financial interests in those airlines which CIBC had.

THE COURT: Take your time. Don't lose the screws.

MS. LEWIS: This is under the tab CIBC financial interests in Baltia's competitors and it is Exhibit Numbers 17 through 76.

MR. SCHAFFER: Your Honor, I am afraid we are at a loss to know what exhibits are being referred to.

THE COURT: She just said but you didn't hear. Repeat please.

MS. LEWIS: This exhibit shows the financial interest that CIBC has in the airlines.

MR. SCHAFFER: That wasn't my question. My question is what are these exhibits to.

MS. LEWIS: They are relevant —

THE COURT: The question —

MR. SCHAFFER: What document are they contained in?

THE COURT: We are looking for them as you speak.

MS. LEWIS: I am sorry. They are in these exhibits for today. They were delivered to your law firm.

THE COURT: We don't have them. Yes.

MR. SCHAFFER: When were these delivered? I don't have them, your Honor, and on a motion to dismiss I am not sure why these exhibits from outside of the record are being referred to.

THE COURT: This came in yesterday, right?

MS. LEWIS: That's correct, your Honor.

THE COURT: So how could you make these part of your opposition?

MS. LEWIS: Two reasons. First, my understanding was from the plan management that you wanted to have an understanding of what this was about. Secondly, scienter is an issue here. We have motive opportunity. We are here whether or not there is a claim and whether or not there should be access to the courts to resolve it. This is the —

THE COURT: Is this a case management conference today?

MS. LEWIS: Yes, it is. It was scheduled for today.

MR. SCHAFFER: My understanding was we were here on oral argument to dismiss your Honor.

THE COURT: Just a moment.

(Pause)

THE COURT: I am advised that we originally had this as a case management conference but when the motion came in, since it attacks the sufficiency of the pleadings we advised the parties that we would be taking this as an argument.

To the extent the case management conference is appropriate we will follow the argument if anything remains in the complaint but this is a motion to dismiss and these papers are not properly included with your opposition papers. They are out of time.

I am handing these back to you. I am not considering them. Take those back and argue the motion without your charts.

In any event, the financial motivation which may or may not exist in the scheme that you outlined is not directly relevant to the questions that are put by Mr. Schaffer's motions.

This is an alleged fraud in connection with a purchase or sale of securities or other aspects of the claims that you pleaded were available to you. Is there res judicata, collateral estoppel by reasons of the decisions of the appellate division?

Take those down, please.

* * *

THE COURT: So Hornblower would have an action potentially against Oppenheimer. That doesn't mean that Baltia has an action.

In fact, I believe that Mr. Schaffer is correct in his footnote one on page 2 of his reply brief in saying that there is no private right of action under Section 17(a) of the Exchange Act.

He cites Bra[w]er v. Options Clearing Corp., 633 F. Supp. 1254, 1261, a decision of Judge Stanton of this court affirmed by the Second Circuit, 807 F.2d 297. The decision being on other grounds —

MS. LEWIS: Our action is not based on 17(a). What we are saying is that when Congress set this up it did not want to see the power in the clearing agency to say —

THE COURT: Ms. Lewis, if you are not proceeding under Section 17 why is there this long exegesis telling me about it?

MS LEWIS: Because they have violated.

THE COURT: That may be or may not be but it is of no concern of yours because you don't have a right to sue them for it.

MS. LEWIS: All right, then what I am saying is that Section 29 of the Securities and Exchange Act states that any contract in violation of any act, any part of the Exchange Act, is void.

THE COURT: It is not for you to say whether it is void or not. You don't have standing. There is no private right of action under Section 17(a). You have just agreed.

Let's go back to the complaint, please, and tell me why it is deficient; why this is a fraud allegedly in connection with the purchase or sale of a security.

MS. LEWIS: I turn to the definition of sale in the Securities and Exchange Act that would be controlling on that definition because we are dealing here with the action within it. It is Section 3, number 14 and number 13.

The terms buy and purchase each include any contract to buy, purchase or otherwise acquire. The term sale itself each include any contract to sell or otherwise dispose of. When the difference —

THE COURT: The unwillingness of Oppenheimer to be clearing broker and the alleged failure to tell people about that, that doesn't have to do in my judgment with the purchase or sale of a security as the required criteria set out by Bankers Life made it to be and many other cases.

This is not a fraud in connection with the purchase or sale of the securities. I think Mr. Schaffer is absolutely correct. You lack standing under Section 10(b).

What other causes of action?

It is a very difficult complaint to read. There is no identified claims for relief. It just goes on and on and on alleging all kinds of things under all kinds of statutes.

MS. LEWIS: Your Honor, I refer you to the submission made yesterday to you directly.

THE COURT: Yesterday was too late. There is a time and place for everything. I hold —

MS. LEWIS: I will —

THE COURT: Ms. Lewis, I hold that you have no standing to sue or complain against Oppenheimer under the clearing agreement. The clearing agreement is between Hornblower and Oppenheimer and you may not invoke it.

I hold along with the appellate division on the merits and because of collateral estoppel that there was no fraud of your client under the public disclosure statement.

Appendix

I hold that you have no right to invoke the clearing agency as a basis for suit.

I hold that you have no basis to complain for a violation of the National Clearing System.

The appellate division has spoken on the issue of contract, whether unilateral or promissory estoppel or anything else. You are not a party to the contract.

You are [not] entitled to have third-party beneficiary status under the contract.

I hold you have not stated a claim for interference with contract. The contract is a normal clearing contract between Hornblower and Oppenheimer and is a right on the part of the clearing agent to decide for itself whether or not it will want to become a clearing agent for the customer. They can take on a customer for itself.

I am now up to page 51 of your complaint. There is no right under a client's part to be a third-party beneficiary. The appellate division so holds both on collateral estoppel and on the merits. I hold that you have no standing to be a third-party beneficiary.

I have already ruled — I am now up to page 70 of the complaint — that you have not appropriately alleged a fraud in connection with the securities transaction and therefore you cannot invoke Section 10(b) of the Exchange Act or Rule 10(b)(5) or 18(a) thereunder.

Furthermore, I do not believe that you have properly alleged a predicate acts or other constituent parts of a RICO case and therefore there is no basis for a claim under RICO.

I have gone through your complaint. I find the complaint lacks merit.

I grant the motion to dismiss.

These are the conclusions. It will be issued this afternoon or Monday.

Mr. Schaffer's motion for sanctions is denied.

Thank you all.

(Proceeding adjourned.)

Supreme Court U.S.
FILED
MAR 6 2002
OFFICE OF THE CLERK

(3)

No. 01-909

In the

Supreme Court of the United States

BALTIA AIR LINES, INC.,
(shareholders, employees and creditors),

Petitioner,

v.

CANADIAN IMPERIAL BANK OF COMMERCE and
CIBC OPPENHEIMER CORP.,

Respondents.

PETITION FOR A WRIT OF CERTIORARI TO
THE UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

REPLY TO RESPONDENTS BRIEF IN OPPOSITION

Of Counsel:
Steven Orlikoff
220 E. 54th Street, #7N
New York, NY 10022
Telephone:(212) 826-6747

Steffanie J. Lewis
Counsel of Record
The International Business Law Firm, PC
3511 North Thirteenth St.
Arlington, Virginia 22201
Telephone: (202) 522 1198
Facsimile: (202) 522 1197
Email: slewis@iblf.com

Attorneys for Petitioner

CURRY & TAYLOR • (202) 393-4141 • HTTP://USSCINFO.COM

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REPLY TO OPPOSITION

CIBC's reply highlights their fear that Baltia's complaint will ever be granted access to an evidentiary hearing. Only by defeating access to the federal courts through protective contractual clauses designed to prevent disclosure, can CIBC retain its claimed absolute right, as the middleman clearing agent, to control the flow of capital investment.[1]

CIBC relies on the inability of the SEC to effectively intervene, and the courts' natural reluctance to enter a void. The void is § 17 A(b)(6).[2] Does it mean what it says? Or can it be ignored with impunity on the basis of technical legal rules which might, if applied in a blanket, inapposite manner, prevent the remediation of a vicious wrong Congress intended to prevent.

I. Certiorari Needed to Properly Define and Resolve the Meaning and Impact of Section 17 (A)(b)(6)

A. The Language of the Section, Identifying a Protected Group and Defining Prohibited Conduct, Demonstrates Congressional Intent to Create a Private Cause of Action

Unlike the earlier provisions of § 17 A, which discuss rules of proceedings, participants, schedules, applications and registrations, (b)(6) directly and simply identifies a group of persons that it protects, those who seek access to clearing services offered by any participant therein. This identification of a specific group of individuals to be protected is indicative of the intent of Congress to create a private cause of action. *California v. Sierra Club*, 451 U.S.

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[1] "CIBC Oppenheimer in its absolute discretion can refuse to accept any client, can refuse to clear any particular transaction." Transcript, U.S. District Court, p.3, l.13-15; (Reply App.)

[2] All Sections cited in this Reply Brief refer to the Securities Exchange Act of 1934, as amended, 48 stat. 881, 15 U.S. Code, Secs. 78a-78jj. (Commonly, "Exchange Act")

287 (1981). By identifying a duty to these specific individuals and prohibiting its violation, this provision fits the design of private litigation as an effective means of sanctioning and deterring the prohibited conduct. In addition, this is the only way a wronged party can be compensated for a violation.

In §27, Congress directed that suits to enforce duties, which would include the duty to provide access to services, be brought in the district court and, in §21D(e), Congress displays an intent that monetary damages, if proven, be awarded. In its Reply, CIBC suggests that these remedies are only available to investors to complain of violations of the Securities Act. (Reply, pages 15, 16) Yet, without an issue and an issuer, there is no need for clearing services at all.

Section 17A(b)(6) does not say "participant" or "issuer" or "investor" or "buyer" or "seller" which Congress could have easily specified. It says "person." While not controlling, the agency charged with overseeing the Act, the SEC has specifically recognized issuers as "persons" within the meaning therein.[3]

By defining the group protected and prohibiting specific conduct, the only rational meaning of this statute is to give both investors and issuers the right to litigate the discretionary limiting of access by a clearing agent, precisely as was done by CIBC to Baltia in this case. As currently interpreted by the courts below, §17A(b)(6) as a "mandate would lose all meaning if a party who continuously objected to an uncorrected categorical violation of the mandate could obtain no relief at the end of the day." *Lexecon v. Milberg*, 523 US 26, 43 (1998).

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[3] Securities Exchange Act Release No. 11604 (Aug 19, 1075), footnote 7:
"Clearing agencies, under Section 17A(b) (6), may not prohibit or limit access by any person to services offered by any participant therein. Persons having or seeking access to facilities of a . . . registered clearing agency include issuers of securities."

B. Section 17 A (b)(6) Creates a Relationship and A Duty Which Contracts Cannot Void

CIBC's alleged absolute contract right to deny access, at will, without the due process proceedings set forth in §17A(b)(5), is, on the one hand, a rules violation properly enforced and sanctioned by the SEC under *Brawer*, yet the practice of denying access is a statutory violation. Congress did not include §17A(b)(6) in the SRO rules. *See* §17A(b)(3). A contract made in violation of a statute is void. *Ewert v. Bluejacket*, 259 US 129, 138 (1922); *Waskey v.Hammer*, 223 US 85, 94 (1912); *Connolly v. Union Sewer Pipe Co.*, 184 US 540, 548 (1902).

CIBC in its Reply (pages 17, 22) argues that even if parts of its contract were illegal, Baltia would only be entitled to rescission or the "voiding" of the contract, rather than the provisions Baltia complains of, which allegedly allow them to escape the applicability of federal law, Paragraph VII(F), (Record A-65), and the provisions which allegedly allow them to discriminate at will, Paragraph I(D) and III(F.) (Record A-49, 53) (Reply, page 4). Congress expressly made any contract, or any practice, in violation of any provision of the Securities Exchange Act of 1934, void as to the person engaging in such practice. § 29(b). Even without the savings clause contained in CIBC's contract with Baltia's underwriter (Record A-65), § 29 ensures that only those illegal provisions of such a contract are void.

By statute, in § 17A(b)(6), Baltia is the intended third-party beneficiary of the participation contract between CIBC and H&W.[4] By § 17a(b)(6), CIBC was made a classic fiduciary — a person having duty, created by his undertaking, to act primarily for another's benefit in matters

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[4] The CIBC - H&W contract is the legal vehicle by which H&W became a participant in CIBC's clearing agency, with inherent statutory rights and limitation. The CIBC - H&W contract is not a commercial contract for unregulated services provided by CIBC. For accuracy, Baltia refers to the CIBC-H&W contract as a "participation agreement."

connected with such undertaking. *Basic Inc. v. Levinson*, 4865 US 239 (1988), n. 17, and related cases agree that where a fiduciary relationship exists, there is a duty to disclose. CIBC cannot contract to void the relationship or the duty.

Furthermore, the language cited from CIBC's boiler-plate contracts as the source of its absolute right does not apply to Baltia. Baltia never was, nor asked to be, an account of CIBC. There is no allegation that any securities transactions at issue were syndicated in any manner. The whole section cited by CIBC about advance written notification relates only if brokers "enter into, or join, a syndicate."

C. *Brawer v. Options Clearing Corp.* Does Not Decide Whether 17A(b)(6) Gives Rise to A Private Cause of Action.

In its Reply, CIBC relies on *Brawer v. Options Clearing Corp.*, 633 F. Supp. 1254, *aff'd*, 807 F. 2d 297, *cert denied*, 484 US 819 (1987) for the proposition that §17 A(b)(6) is intended to be enforced by the SEC. In fact, the *Brawer* court did not interpret that provision, but considered a private suit against self-regulatory organizations (SRO), for breaking their own rules when they did not adjust option prices on a security. The *Brawer* court interpreted §17 A(b)(3) and ruled that Congress displayed an intent that the SEC enforce the rules enacted by self-regulatory organization (SRO).[4]

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[4] Each clearing agency's rules are submits with an application registration and become terms of the clearing agency's license. In §19(h)(1), the SEC is authorized to suspend or revoke the license of a clearing agency or suspend any of the privileges conferred by that license.

II. Certiorari Should be Granted Because There is No Other Effective Remedy for Fundamental Wrongdoing

In its Reply, CIBC argues "standing" as its principal line of defense because it fears that its actual conduct would not bear any effective legal scrutiny. By seeking to contractually obscure access to federal review, with its undisclosed contracts and third party beneficiary limitations, it seeks to hide conduct which would be easily condemned if revealed. Baltia seeks merely the right to expose the alleged illegal conduct to a federal court which will then evaluate it and judge it in accordance with federal law.

The SEC cannot effectively monitor and prevent illegal conduct as alleged in Baltia's complaint, because the investigation proceeds so slowly and no remedy can be fashioned until after the fact of a violation. Since no financial remedy is available to an injured party, the wrong will be uncompensated, and therefore, largely undeterred. In addition, the illegal use of its controlling power by a clearing agency can be expected to be quite judicious, striking only in such cases as in Baltia's, where the theft and payoff is able to be effectively hidden, and the time frame so critical that the offense can be easily forgotten in the ebb and flow of the capital markets.

The broker dealers cannot effectively complain as their interests are inextricably divided between numerous investors and their client issuers, some of whom may be "favored" by the clearing agent and others which the clearing agent may choose, illegally, to diminish. They cannot afford to complain too much about a single transaction or offering.[6]

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[6] CIBC graciously cleared other of Baltia's underwriter's transactions after refusing Baltia's, placing the underwriter in the difficult situation, complaining and accepting, while also seeking to change its clearing agency. After it was able to change agents, it commenced an action against CIBC. Currently, the underwriter's arbitration against CIBC lingers on.

Section 17A(b)(6) makes Baltia the intended third-party beneficiary of the participation contract between CIBC and H&W. Section 17A(b)(6) makes CIBC the classic fiduciary — a person having duty, created by his undertaking, to act primarily for another's benefit in matters connected with such undertaking. *Basic Inc. v. Levinson*, 4865 US 239 n. 17(1988) and related cases agree that where a fiduciary relationship exists, there is a duty to disclose. As a fiduciary, CIBC owes Baltia, and like protected persons, a duty to disclose any material fact that would prevent clearance of an otherwise legitimate securities transaction. With recognition of the legal relationship established by § 17A(b)(6), § 18a becomes a viable cause of action.

CIBC claims that if Baltia's interpretation is upheld, it will be forced to engage in a careful screening of brokers, in order to exercise its discretion to screen out fraudulent trades. (Reply, pages 20, 21) This specious argument ignores the fact that the clearing agency acts in a different role from the broker/dealers, upon whom Congress imposed distinct obligations. § 3 (a)(4,5) and § 15. Guaranteed access does not force knowing participation in fraud or clearance where funds are insufficient or error exists,[7] but eliminates abusive, self-serving conduct which the statute was enacted to prevent.

CONCLUSION:

There is no doubt Congress intended 17A(b)(6) to mean something. CIBC will win if Baltia, its shareholders and employees are not "persons" within the meaning of that provision, and the US securities system, as enacted, recognizes no legal relationship between a clearing agent and the beneficiary of its contract to provide clearing services.

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[7] CIBC mentions "financial unfeasible" trades. The limited functions of a clearing agency make it incapable of determining the feasibility of a securities transaction. Congress tasked broker/dealers with effecting securities transactions. §3(a)(4) and (5).

Litigants such as Baltia will rarely be able to seek redress because in the US securities system, power is so intensely concentrated and unequal. The SEC has neither time nor resources to address this issue. Broker underwriters will be unable to effectively complain because they are so dependent on clearing agents.

This court has a special responsibility to ensure access to judicial review, especially when no effective remedy would otherwise exist to correct a potential grievous wrong.

Unless fully briefed, this case will be cited for the proposition that contracts between a clearing agency and a broker do not have to comply with § 17 A(b)(6), and that contracts preventing exposure of violations can effectively serve as a shield against wrongdoing. Clearing agencies will slowly and perniciously assert their ability to control distribution of capital, at will. Wronged parties will recognize the futility of complaint, and our system will continue its dangerous devolution towards the unmonitored concentration of power.

Unabated, the termite gnawing at the timber of the federal securities system will continue its gentle feast. Baltia asks that, as Congress intended, it be permitted, as the wronged party and the only party able properly do so, to investigate, litigate and perhaps expose this activity.

Respectfully submitted,

Steffanie J. Lewis
Counsel of Record

The International Business Law Firm, PC
3511 North Thirteenth St.
Arlington, Virginia 22201
Telephone: (202) 522 1198
Facsimile: (202) 522 1197
Email: slewis@iblf.com

Of Counsel:
Steven Orlikoff
220 E. 54th Street, #7N
New York, NY 10022
Telephone:(212) 826-6747

REPLY APPENDIX

RELEVANT PORTIONS OF TRANSCRIPT DATED JUNE 14, 2000

United States District Court
Southern District of New York

00 Civ. No.: 678 (AKH)

Baltia Air Lines, Inc.
Plaintiff
v.
CIBC Oppenheimer Corp. et al
Defendants
Before:
Hon. Alvin Hellerstein, District Judge

Appearances

Steffanie Lewis
Steven Orlikoff
Attorneys for Plaintiff

Schulte Roth & Zabel, LLP
Attorneys for Defendants
Frederick P. Schaffer
Martin Zerwitz

The Court: . . . I used to represent Loeb Rhodes a number of years ago. It is nice to see they have revived themselves.

As I remember Rule 405 of the Stock exchange rules required that clearing agents become brokers of the customers directly. Is that still operative? It is part of the know-your-customer rule.

Mr. Schaffer: If they have agreed to clear for the customer of an introducing account, I believe that is correct.

In this case, of course, CIBC Oppenheimer never agreed to accept Baltia Airlines as a client in any way and never agreed to clear any transaction.

The Court: Implicit in the whole relationship of clearing agent and introducing broker is the right of the clearing agent to decide who is its customers.

Mr. Schaffer: That is exactly right.

The Court: Otherwise, you couldn't very much have liability, regulatory liability, of a clearing broker if the clearing broker was forced to take the customers of the introducing broker.

Mr. Schaffer: Precisely. That is why the agreement here provides that CIBC Oppenheimer in its absolute discretion can refuse to accept any client, can refuse to clear any particular transaction.